Filed 6/1/10 P. v. Evangelista CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOHN GIL EVANGELISTA, Defendant and Appellant.	B214386 (Los Angeles County Super. Ct. No. KA081035)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia Fisher, Judge. Affirmed.

Salvatore Coco and Sandra J. Applebaum for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

John Gil Evangelista challenges his conviction of burglary, manufacturing a controlled substance, forgery, and possessing counterfeiting apparatus. He argues the trial court had a sua sponte duty to instruct the jury on the limited use of other crimes evidence, or, in the alternative, that his counsel was ineffective in failing to request the instruction. Appellant also argues his sentence on one conviction should have been stayed under Penal Code section 654[1] and that the trial court erred in imposing consecutive sentences on three of the four counts of which he was convicted.

We find neither instructional error, ineffective assistance of counsel, nor sentencing error.

FACUTAL AND PROCEDURAL SUMMARY

In July 2007, Vanessa Weisberg returned from a brief trip and discovered her home had been burglarized and ransacked. Many items, including computers, cameras, jewelry, and apparel were missing. A vase had been moved from the kitchen table. Appellant, his sister, and her boyfriend lived next door to Weisberg, but were moving out the weekend of the burglary. Weisberg had notified them that she would be away that weekend. She testified that while she socialized with appellant and his sister in her backyard, she had never invited appellant into the house. A criminalist identified a fingerprint on the neck of the vase that had been moved during the burglary as appellant's.

Several months later, officers went to appellant's new house in a different neighborhood in Diamond Bar to arrest him pursuant to a warrant. When officers knocked and announced they had the warrant, appellant fled. He dropped a white box as he ran. Appellant was later apprehended hiding in a doorway. Officers recovered the box dropped by appellant which contained counterfeit $100 and $10 bills, paper stock, five sheets of paper with currency printed on one side only, and pellet gun pellets.

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1 Statutory references are to the Penal Code unless otherwise indicated.

A search of the garage at appellant's house revealed paraphernalia often used in manufacturing methamphetamine, including beakers, chemicals, hot plates, 1,170 pills of pseudoephedrine and ephedrine products, chemical formulas, and other equipment, as well as the presence of methamphetamine. The detectives found a pellet gun and pellets, a loaded short-barreled shotgun, a .22-caliber rifle, holsters, ammunition, magazines, and firearm parts. They also found smoke bombs, an improvised incendiary device consisting of a road flare taped to a can of toluene, and a bullet proof vest. Materials related to counterfeiting currency were found including a paper cutter, sheets of paper printed with $20 and $100 bills, individual counterfeit $10 and $100 bills, cameras, computers, and printers. A Secret Service agent testified that the counterfeiting items seized were indicative of a "higher quality" counterfeiting operation. An envelope labeled "United States Immigration and Naturalization Service" (I.N.S.) contained a California driver's license in the name of "John Gil Jocson Evangelista." An I.N.S. badge was found in a car parked at the house. Ms. Weisberg identified an IBM laptop computer found at appellant's house as one of the computers stolen from her house.

Appellant was convicted as charged of one count of residential burglary (count 1, § 459), manufacturing methamphetamine (count 2, Health & Saf. Code, § 11379.6, subd. (a)), forgery (count 3, § 476), and possessing counterfeiting apparatus (count 4, § 480). Appellant retained new counsel and moved for a new trial. That motion was denied. He was sentenced to an aggregate term of eight years and four months in prison. This timely appeal followed.

DISCUSSION

I

CALCRIM No. 375, a limiting instruction on use of evidence of uncharged offenses, was not requested or given. Appellant argues the trial court had a sua sponte duty to give the instruction or in the alternative, that his retained counsel was ineffective in failing to request it, and in treating the evidence of uncharged offenses in closing argument. He argues the instruction was necessary because the prosecution presented

evidence of several uncharged crimes: possession of an improvised incendiary device, possession of ballistic body armor, possession of firearms and ammunition near drugs, possession of checks written in various peoples' names, and possession of "'a United States Immigration and Naturalization Services, Department of Justice . . . .'" In further support of his argument, appellant cites passages in the prosecutor's closing and rebuttal arguments referring to this evidence.

Respondent argues the evidence cited by appellant was germane to the current offenses and was not evidence of a "'prior bad act'" or uncharged crime. Respondent refers to the trial court's comments in denying appellant's motion for new trial, brought on the ground that CALCRIM No. 375 should have been given and that trial counsel was ineffective in failing to request the instruction. The trial court found that the evidence at issue "wasn't ominous stuff in any regard and it wasn't necessarily even, as the People pointed out, other crimes. . . . [T]he minimal way in which it was introduced, and it was done extremely quickly in the context of I don't know how many items of evidence, was a way of simply tying in the defendant."

The Supreme Court held there is no sua sponte duty to give a limiting instruction on evidence of past criminal conduct in *People v. Collie* (1981) 30 Cal.3d 43, 63-64. The *Collie* court recognized "a possible exception in 'an occasional extraordinary case in which unprotested evidence . . . is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052, quoting *People v. Collie, supra,* 30 Cal.3d at p. 64.)

In *People v. Farnam* (2002) 28 Cal.4th 107, evidence of the defendant's past offenses was admitted. The Supreme Court held the trial court had no sua sponte duty to give a limiting instruction: "This was not an 'extraordinary case' in which the unprotested evidence was '*both* highly prejudicial *and* minimally relevant to any legitimate purpose' *and* was 'a dominant part of the evidence against the accused.'" (*Id.* at pp. 163-164, quoting *People v. Collie, supra,* 30 Cal.3d at p. 64.) The *Farnam* court concluded that even if some of the evidence was either minimally relevant or not relevant

at all, it did not constitute a "'dominant'" part of the case given the strength of other evidence and was not inflammatory or otherwise highly prejudicial. (28 Cal.4th at p. 164.)

Here, the evidence of other potential offenses was admitted in the course of testimony by investigating officers describing items seized from the property where appellant lived at the time of his arrest. One reason given for the presentation of this evidence was to connect appellant to the property, since extensive evidence of a drug laboratory and counterfeiting operation also was seized. The evidence was not a dominant part of the prosecutor's case, and in context, was not improperly prejudicial. Some of the evidence, particularly that detailing the weapons and ammunition found, was relevant to testimony that operators of methamphetamine laboratories are typically armed. The court had no sua sponte duty to give CALCRIM No. 375.

This brings us to appellant's alternative argument that his counsel was ineffective in failing to request the instruction, or in failing to argue the substance of the instruction. He also claims counsel was deficient because he did not remind jurors that this evidence was admitted for a limited purpose pursuant to CALCRIM No. 303, and could not be used to conclude appellant is of bad character or disposed to commit crimes.[2] "An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218 (*Ledesma*).) The same standard applies to retained and appointed counsel. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 344-345.)" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1147 (*Montoya*).) "In determining whether counsel's performance was deficient, we exercise deferential

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[2] As given, CALCRIM No. 303 instructed the jury: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

scrutiny. (*Strickland*, *supra*, 466 U.S. at p. 689; *Ledesma*, *supra*, 43 Cal.3d at p. 216.) The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citation.]" (*Id*. at p. 1147.)

The standard of appellate review of a claim of ineffective assistance of counsel is well established. "'"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of professional assistance.'" [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.]'" (*People v. Stanley* (2006) 39 Cal.4th 913, 954, citing *People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

The record before us is silent as to why appellant's trial counsel chose not to request the instruction. As we have discussed, the testimony about items seized which potentially represented uncharged criminal offenses committed by appellant was brief and occurred in the context of cataloging the items seized from the premises. Appellant has not affirmatively shown the failure to request CALCRIM No. 375 involved a crucial issue. (*Montoya*, *supra*, 149 Cal.App.4th at p. 1147.) Since the evidence of these other items was so tangential, appellant's counsel may have had a reasonable tactical basis for not requesting the instruction. In comparison to the evidence regarding the methamphetamine laboratory materials and the counterfeiting materials, the evidence of the other items seized was minimal. Trial counsel could reasonably have decided that it was in his client's best interest not to discuss this evidence in closing argument to avoid emphasizing it to the jury. No ineffective assistance was demonstrated on this record.

II

Appellant argues sentencing on both count 3 (forgery, § 476) and count 4 (counterfeiting or possession of counterfeiting materials, § 480) is barred by section 654 because both offenses were committed for a single objective.

"An accusatory pleading may charge different statements of the same offense. (§ 954.) As a general rule, 'a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. "In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' [Citations.]" [Citation.]' (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.)" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 460.) But section 654 prohibits multiple punishment under certain circumstances. It provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

Section 476 provides: "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery." This statute "requires that the mere possession of a fictitious or altered bill be with the specific intent 'to utter, pass, or publish' the bill." (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1454.) "[T]he elements of the offense described by section 480 are as follows: [¶] 1. That a person knowingly possessed paper made use of in counterfeiting bank notes or bills but not consisting of the completed counterfeit bank notes or bills themselves; [¶] 2. That the possession was with criminal intent. [¶] It is apparent that an element of the offense described by section 480 is the possession of paper not consisting of the counterfeit bank

notes or bills themselves." (*Id*. at pp. 1452-1453, citing *People v. Clark* (1992) 10 Cal.App.4th 1259, 1267.)

The court in *Clark* concluded that the Legislature "has separately treated the possession of completed counterfeit bills and the making or possessing of the means of counterfeiting." (*People v. Clark*, *supra*, 10 Cal.App.4th at p. 1267.) Here the evidence established that appellant possessed both completed counterfeit bills and the materials necessary to manufacture more. A separate objective was required for the two offenses and punishment for each was proper under section 654.

III

Finally, appellant argues the trial court erred in imposing consecutive sentences for burglary (count 1), manufacturing methamphetamine (count 2), and forgery (count 3). He contends the crimes and their objectives were "predominately dependent upon each other, and the crimes were committed so closely in time and place as to indicate a single aberrant behavior." He acknowledges that the burglary occurred in July 2007 while the evidence of the other crimes was seized months later, but argues there was no evidence as to when the drug and counterfeiting activity commenced. He asserts: "It is safe to assume that it was occurring near the time of the burglary. One reason being the fact that burglaries and drug crimes often go hand in hand. Additionally, because the computers were taken in the burglary, and computers were used for the counterfeiting, there is a definite relationship." He cites no authority to support this speculation.

In imposing a consecutive term for count 2 the trial court observed: "I'm not running it concurrent. It's a separate and distinct crime. Separate time. Separate place. And I think it is appropriate to add that consecutive. I see absolutely no justification for running it concurrent." The court made similar statements in choosing to impose a consecutive term on count 3: "Again an entirely different type of crime. . . . [W]e've got the residential burglary [count 1]. That's a discrete crime. And on top of that, added to that, and I think it's important to add to that consec, he's actually manufacturing—making money. . . . It's consecutive because it's a separate discrete crime from these other crimes."

California Rules of Court, rule 4.425(a) outlines factors relating to the commission of the crimes which may be considered in deciding whether to impose consecutive sentences. These factors include "(1) The crimes and their objectives were predominately independent of each other. . . . [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."

Here the evidence established that the residential burglary charged in count 1 occurred months before, and in a separate location from the independent crimes of forgery and manufacture of methamphetamine. The counterfeiting activity and drug manufacturing activity were "predominately independent" of each other. We find no error in the imposition of the consecutive sentences.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.